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## Vol. IX, Tab 46 - Ex. 54 - Deposition of Eric Duehring (Rosetta Stone Vice President of Consumer Marketing)

Eric Duehring  
*Rosetta Stone*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

-----X  
ROSETTA STONE LTD.,

Plaintiff,

v.

Civil Action No.:  
1:09CV736 (GBL/JFA)

GOOGLE INC.,

Defendant.  
-----X

HIGHLY CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

The videotaped deposition of ERIC M. DUEHRING, was held on Monday, March 8, 2010, commencing at 9:05 a.m. at the Offices of Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Avenue, Washington, D.C.; before Amy E. Sikora, RPR, CRR, CSR-NY, CLR, Notary Public for the District of Columbia.

Job No.: CS243409

REPORTED BY: Amy E. Sikora, RPR, CRR, CSR-NY, CLR

1 Q. Yeah. I appreciate that  
2 clarification. Because I actually meant the  
3 analysis of the profitability of the different  
4 sales channels.

5 A. Yeah, like I said, it's very  
6 difficult to look at individual vertical  
7 profitability because it's an ecosystem. And the  
8 challenges we have is tracking spend and benefit  
9 and costs across all verticals and figuring out  
10 which is benefiting from which.

11 So while the underlying data about  
12 cost and spend in a category and the revenue  
13 coming from that category are clear, how that  
14 spend is impacting other verticals is unclear.

15 Q. In the reports you've seen that  
16 analyze the profitability of these channels, do  
17 they use the term "net contribution"?

18 A. Yes.

19 Q. Is the net contribution indicated on  
20 those reports, do you believe that that number is  
21 accurate?

22 A. I think I just answered that  
23 question.

24 Q. In the time that you've been at  
25 Rosetta Stone, since May 2009, do you recall from

1 then there are some on the right rail.

2 Q. On the left side of the page?

3 A. That's right. On the left side,  
4 sponsored links are listed in line with organic.  
5 And then on the right side of the page they're  
6 listed down the right-hand side.

7 Q. Okay. Are sponsored links ever  
8 listed at the top of the page above the organic  
9 links?

10 A. Yes. That's what I -- yeah. Above  
11 the organic links on the left side.

12 Q. Oh, that's what you meant by "the  
13 left side"?

14 A. All the organic links are left  
15 justified and so above that, organic.

16 Q. Okay. I -- I was not understanding  
17 your answer. Okay. So I believe that that  
18 answer was with respect to the branded keyword  
19 search terms.

20 Does Rosetta Stone have any goals  
21 with respect to where it would want  
22 Rosetta Stone's sponsored advertising links to  
23 appear when someone is searching on nonbranded  
24 Rosetta Stone?

25 A. Well, for search terms like "learn

1 Spanish," which is an example of a nonbranded  
2 term, we actu -- we absolutely want to have a  
3 strong position. We're always weighing that  
4 against whoever else is bidding and -- and where  
5 they push the bids to.

6 You know, sometimes it's really  
7 frustrating because we'll see multiple negative,  
8 deceptive ads, pirates, and they're really  
9 misleading consumers. And so you see a "Learn  
10 Spanish" ad and then if I see, for instance, a  
11 Rosetta Stone pirate in the top three, and I know  
12 folks clicking on that are going to be ripped  
13 off, it just frustrates me. I've worked so hard  
14 to get somebody to be interested in my brand, and  
15 to have it siphoned off to a pirate is really  
16 maddening.

17 Q. Okay. Other than the pirates that  
18 you mentioned, if someone were to search on,  
19 let's say, "learn Spanish," are there any other  
20 sponsored links you can think of that might, as  
21 you said, mislead consumers?

22 A. Sure. There was one last year that  
23 really bothered me and still comes and goes. It  
24 says, "Beware the Stone" as the ad copy. So  
25 they're use one of my branded marks in their ad



1 copy and they're using it to be disparaging about  
2 me in that environment. And sure, that's  
3 frustrating to me.

4 Q. But how would that mislead a  
5 consumer? How would the website that you just  
6 described, "Beware the Stone," how would that  
7 mislead a consumer?

8 A. Well, that one might not necessarily  
9 mislead, but it certainly does frustrate us that  
10 somebody is out there using my mark against me.

11 Q. Would you describe that site as a  
12 site that is reviewing or critiquing the  
13 Rosetta Stone product?

14 A. I don't think so. They're  
15 selling -- they're selling a competitive product,  
16 I believe.

17 Q. I think you said, with respect to  
18 the nonbranded keyword search terms,  
19 Rosetta Stone's goal was to have a strong  
20 position on the sponsored links.

21 What do you mean by "strong  
22 position"?

23 A. I want to be visible.

24 Q. What do you mean by -- by that?

25 A. Well, okay. So because Google

1 strives so hard to present organic links in a way  
2 that the most relevant results appear at the top  
3 of the list, many consumers are confused about  
4 whether or not a sponsored link is organic or  
5 not. And so appearing in line with those organic  
6 results is valuable because people make the  
7 mistake of clicking on a sponsored link when they  
8 think they might be getting an actual official  
9 website or an objective listing.

10 And so, unfortunately, the confusion  
11 created requires us to be in a position to make  
12 sure that when folks might be confused we're in a  
13 position that they click on us properly.

14 For instance, if you certain on  
15 Rosetta Stone, the first organic result might be  
16 rosettastone.com, and if there are three links  
17 above it for a pirate site and I don't bid to be  
18 in that position, and I run the risk of somebody  
19 mistaking that one of those sites is the official  
20 site, well, that's deceptive to the consumer and  
21 destructive to all the work I've done to get  
22 somebody to do a search on my brand.

23 Q. You said in your answer, "many  
24 consumers are confused about whether or not a  
25 sponsored link is organic or not."

1                   What is your basis for that belief?

2           A.       I've seen information about it.  
3   I've seen -- it seems like I've read articles  
4   about it. I've read articles about Google as  
5   well.

6                   In fact, I'm not sure, I read a  
7   recent article in Wired about the challenges  
8   between sponsored links and -- and organic links.  
9   There is some confusion.

10          Q.       Did that article in Wired that you  
11   just mentioned, did that article say that  
12   consumers are confused about sponsored link and  
13   organic link?

14          A.       No. I read recently an article in  
15   Wired, but I read an awful lot about the  
16   industry. I don't know where that specific piece  
17   of data came up. But there is confusion  
18   regarding sponsored links.

19          Q.       Can you recall anything, any data,  
20   publication, report, anything you've read that  
21   would form the basis for your belief that  
22   consumers are confused about the difference  
23   between sponsored links and organic links?

24          A.       Yeah. I can only point to what I  
25   hear anecdotally and what I see in my business



1 every day, which is that people are clicking  
2 unofficial sites thinking they'll find  
3 rosettastone.com or Rosetta Stone official sites,  
4 and they're landing on pirate sites.

5 And then they're buying from those  
6 pirate sites and then they're showing up to talk  
7 to my employees at kiosks every single day or  
8 frequently with a piece of paper that says, isn't  
9 this your website. How come you guys can't take  
10 this return because this not Rosetta Stone  
11 product, and our employees have to explain to  
12 them that they were confused or they were tricked  
13 by going to that website.

14 Q. And do you have any or have you seen  
15 any documents within Rosetta Stone that would  
16 support what you just said; basically, that there  
17 are people that have purchased items from  
18 websites other than Rosetta Stone in the mistaken  
19 belief that they were buying from the  
20 Rosetta Stone website?

21 A. Yeah. I got a call from the  
22 regional manager in the D.C. region just last  
23 week who described very upset customer. It was  
24 probably someone in their 50's who had gone to a  
25 website and they thought it was Rosetta Stone,

1 they bought the product. They ordered it online,  
2 and then after they ordered it they actually  
3 checked at the kiosk and showed them the website  
4 page and said, how come it's only \$148 online.  
5 We had to explain to them that's not our website,  
6 even though it looked just like it.

7 Q. The call that you just mentioned,  
8 are those types of calls logged by Rosetta Stone?

9 A. No. We don't log calls.

10 Q. How did you come to learn that that  
11 call had taken place?

12 A. Because it was made to me.

13 Q. You took that call from the  
14 consumer?

15 A. No. I spoke to the regional  
16 manager. It wasn't a call. It was an in-face  
17 contact with a kiosk sales rep. It was an in  
18 person at a mall somewhere.

19 Q. Does Rosetta Stone do anything to  
20 track consumers that contact Rosetta Stone after  
21 they've purchased a product in a mistaken belief  
22 that it was a Rosetta Stone product?

23 A. Specifically for that purpose, I  
24 don't know. I'm not sure.

25 Q. Have you seen that type of

1 information?

2 A. Like a log of that kind of  
3 information?

4 Q. Any -- anything to track. Log or  
5 otherwise?

6 A. We talk about it frequently. It's  
7 usually anecdotal, and what we've heard many  
8 times when it's anecdotal, meaning someone in the  
9 store is telling us about something that happened  
10 within their team.

11 But, you know, we're not a huge  
12 company and so we don't have the resources to log  
13 every consumer contact we have. What we do is,  
14 we talk about it as a business, and when it  
15 happens with enough frequency, we start to react  
16 to it.

17 Q. And has Rosetta Stone done anything  
18 to react to any communications it's received from  
19 consumers about purchasing products in the  
20 mistaken belief that they're Rosetta Stone  
21 products?

22 A. I'm sorry, I'm not -- can you be  
23 more specific? Did you say, have we done  
24 anything to react to it?

25 Q. Done anything to react to that?

1 Q. What's your basis for believing that  
2 a consumer would be confused by that, by an  
3 amazon.com sponsored link advertisement?

4 A. So not an Amazon affiliate?

5 Q. Not an Amazon affiliate.

6 A. But are they part of Amazon?

7 Q. I'm limiting my question to an  
8 amazon.com sponsored --

9 A. Amazon affiliates are part of  
10 Amazon, that's what I'm trying to understand.

11 Q. I'm limiting my question to just the  
12 amazon.com, not the affiliates right now --

13 A. Right.

14 Q. -- sponsored link advertisements  
15 that use Rosetta Stone. What is the basis for  
16 your belief that those advertisements create  
17 confusion in the marketplace?

18 A. I guess, experience. Understanding  
19 of the marketplace.

20 Q. How has your experience led you to  
21 believe that any consumers are confused by Amazon  
22 placing sponsored link advertisements that use  
23 the word "rosetta stone" in them?

24 A. So I've seen data over time that  
25 shows consumers bounce back and forth between the



1 sites and then frequently doesn't even result in  
2 a sale. A proliferation of links, including  
3 pirate links and Amazon affiliate links, actually  
4 creates dissonance in the category and confusion  
5 and I think it actually suppresses overall sales.

6 Q. Okay. Focusing again on amazon.com  
7 sponsored link advertisements.

8 A. Right.

9 Q. Go back to your answer. Okay. So  
10 you said you've seen data over time that shows  
11 consumers bounce back and forth between sites.

12 How does reviewing that data lead  
13 you to believe that consumers are confused when  
14 they see a sponsored link advertisement for  
15 amazon.com that includes Rosetta Stone branded  
16 terms?

17 A. Yeah. I believe it's creating  
18 confusion, which is making folks having to move  
19 around more to check. Now, they found it  
20 directly from the source, Rosetta Stone, and for  
21 them to then spend time moving from affiliate  
22 sites, partner sites, they see discounts saying  
23 50 percent off, they see discounts saying  
24 10 percent off, free shipping, and they see the  
25 same on our site, they start to question



1 what's -- what's real.

2 Q. Okay. If we focus on the amazon.com  
3 sponsored link advertisements.

4 A. Right.

5 Q. I just want to stay focused on this  
6 one thing right now.

7 A. So it says, Rosetta Stone 10 percent  
8 off as the copy text, as an example.

9 Q. And the link says amazon.com  
10 something. What is the basis for your belief  
11 that there's confusion among consumers in the  
12 marketplace when they view that sponsored link  
13 advertisement?

14 A. I guess my belief is that after a  
15 long period of time of Google not allowing folks  
16 to use trademarks in copy text, to have it  
17 suddenly show up when consumers don't know that  
18 change has been made, might create some  
19 confusion.

20 Q. And how are consumers confused?

21 MS. SPAZIANO: Objection. Lacks  
22 foundation.

23 Q. What are they confused about?

24 MS. SPAZIANO: Same objection.

25 A. I -- I can't tell you what they're

1 confused about. I can't tell you what's in a  
2 consumer's head.

3 Q. When you said that consumers were  
4 confused, what were you referring to?

5 A. I said I believe they're confused.  
6 I do. And I believe there's cause for confusion.  
7 More to the point, I believe there's cause for  
8 confusion. Because in the same way that if  
9 multiple stores in a shopping center had the same  
10 brand name on the front window as the -- as the  
11 title for the store, as the title, the name of  
12 the store, I think consumers would be confused.

13 If I went to the Yellow Pages  
14 looking for triple A plumbing because there was a  
15 trusted triple A plumbing in town and the Yellow  
16 Pages had decided to sell that name, even though  
17 it was owned by that one company, to many  
18 companies to use in their ad text, I think  
19 consumers would be confused, and for that same  
20 reason I think there would be confusion here.

21 Q. Just so I can understand what you're  
22 saying, the amazon.com website and link that you  
23 believe causes consumer confusion --

24 A. I believe that's an example.

25 Q. -- do those links -- do those links

1 have domain names that are Rosetta Stone domain  
2 names or do the domain names they're linking to,  
3 are they amazon.com's domain names?

4 MS. SPAZIANO: Objection.

5 Q. I'm trying to follow your analogy of  
6 the domain names and the store names.

7 A. I don't know what the domain names  
8 are.

9 Q. But I think there is a difference  
10 where the sponsored links where the link is to a  
11 domain that says "Rosetta Stone," followed by any  
12 other series of words, and there's a difference  
13 between that and a sponsored link where the link  
14 is amazon.com and a consumer sees amazon.com,  
15 Rosetta Stone for sale.

16 MS. SPAZIANO: Is there a question  
17 pending?

18 A. Yeah.

19 Q. Do you believe -- and I think you've  
20 said this. I want to understand the basis for  
21 your belief. The sponsored link for amazon.com  
22 that uses Rosetta Stone in the sponsored link ad  
23 creates confusion in the marketplace?

24 A. Yes. It has the potential to create  
25 confusion because the presence of the mark, the

1 presence of the word "rosetta stone" in someone  
2 else's ad suggests that consumers don't know  
3 exactly what they're going to find.

4 Q. If you were to see an advertisement  
5 for Best Buy that used the word "Sony" or any  
6 other trademarked term, do you believe that that  
7 advertisement would create confusion in the  
8 marketplace?

9 MS. SPAZIANO: Objection.

10 A. I don't think that's a fair  
11 comparison. I don't understand the relationship  
12 between a retailer and us as a manufacturer.

13 Q. Isn't amazon.com a retailer?

14 A. They're an e-tail store, yeah.

15 Q. And as an e-tail store, if they  
16 advertise products that they sell by referring to  
17 those products by their name, it's your testimony  
18 that that creates consumer confusion?

19 MS. SPAZIANO: Objection.

20 A. I think it has the potential to.

21 Q. Do you know if Rosetta Stone has  
22 ever contemplated bidding on keywords for branded  
23 terms other than a Rosetta Stone branded term?  
24 For example, have they ever contemplated bidding  
25 on the keyword "Amazon"?



1 entities been identified to Rosetta Stone -- I'm  
2 sorry, has Rosetta Stone identified any persons  
3 or entities that it contend have been confused by  
4 sponsored link advertising?

5 MS. SPAZIANO: Objection. Lacks  
6 foundation.

7 A. I don't know.

8 Q. And if you look at interrogatory  
9 No. 4. The interrogatory says, "Describe all  
10 instances known to YOU of," you, meaning  
11 Rosetta Stone, "of confusion, including mistake,  
12 or deception," I'll skip the parentheses,  
13 "RELATING TO any of the ROSETTA STONE MARKS and  
14 GOOGLE'S advertising program."

15 Since the time these interrogatories  
16 were verified on November 23, 2009, are you aware  
17 of any instances known to Rosetta Stone of  
18 confusion, including mistake or deception,  
19 related to any of the Rosetta Stone marks in  
20 Google's advertising programs?

21 A. Am I aware of any instances?

22 Q. Uh-huh.

23 A. Yes.

24 Q. What are those?

25 A. I've had a couple of different



1 occasions, I described them to you earlier, where  
2 people have walked up to a kiosk representative  
3 in the organization, a customer, and has raised  
4 with a kiosk sales rep, which is a low-level  
5 sales rep in the organization and said, I saw  
6 this ad on Google, it looks like it's X amount or  
7 I saw this ad online and it's X amount, and how  
8 come you can't match my price. Will you match my  
9 price.

10 Q. How many instances are you aware of  
11 where customers have approached a kiosk  
12 representative and asked questions that have  
13 indicated to you that that customer has been  
14 confused related to the Rosetta Stone mark and  
15 Google's advertising program?

16 A. I can only tell you what I hear from  
17 the regional managers and the director of the  
18 kiosk program, which is that it happens all the  
19 time. And I'm not made aware of every instance  
20 because it happens with such great frequency.  
21 And again, you know, low-level employees in the  
22 organization who are trying to sell and demo our  
23 products out in malls and airports getting  
24 approached.

25 The biggest challenge for them is

1 trying to help the consumer understand that it's  
2 a confusing circumstance and that those prices  
3 aren't real and the products are counterfeit or  
4 that somebody is advertising a price unfairly  
5 because no such price exists or -- it's a big  
6 challenge. So their struggle is to actually get  
7 them to get real product, help them learn a  
8 language.

9 Q. Has Rosetta Stone made any effort  
10 whatsoever to account for the instances of  
11 confusion that you just described to me?

12 MS. SPAZIANO: Objection. Lacks  
13 foundation.

14 A. I don't -- I don't know.

15 Q. Do you track those instances in any  
16 way? Do you have any -- I'm sorry, was than  
17 audible response to that last question?

18 A. Yeah. I don't know.

19 Q. Okay. Do you have any reason to  
20 believe that the anecdotal stories that you've  
21 just relayed to me from the kiosk regional  
22 managers and directors have anything at all to do  
23 with Google's advertising programs?

24 A. Yes. If your question was do I have  
25 any reason to believe it is, in specific

1 instances they flagged that somebody did a search  
2 on Google, clicked on a link, went there, thought  
3 they had the real Rosetta Stone site.

4 Q. And how do you know that search was  
5 performed on Google and not performed on a  
6 different search engine?

7 A. Yeah. Frequently people have the  
8 search results and the website they visited  
9 printed out or they describe it.

10 Q. Have you seen those printouts?

11 A. No, I haven't seen those printouts.

12 Q. How do you know those printouts  
13 exist?

14 A. I rely on the honesty of my field  
15 sales folks who are really desperately trying to  
16 help us do business honestly as well.

17 Q. Have you ever asked your sales folks  
18 to give you copies of those printouts?

19 A. No.

20 Q. As far as you can recall, how many  
21 instances of confusion relating to the  
22 Rosetta Stone mark in Google's advertising  
23 program -- can you quantify it for me in some  
24 way, how many instances?

25 A. Very difficult.

1 A. I guess it's a cross-functional  
2 team. Some of our legal team is working on it.  
3 Our online marketing team.

4 Q. Can you give me some names of the  
5 people that you know that are working on it?

6 A. Van Leigh.

7 Q. Anyone else?

8 A. Jason Calhoun.

9 Q. Anyone else?

10 A. Yeah. There's a whole lot of other  
11 folks.

12 Q. Can you recall any other names?

13 A. Yes, I can. You want me to go  
14 through the full list of folks who have been  
15 engaged in trying to fight piracy at the company,  
16 is that what we're trying to establish?

17 Q. No. I'm more focused on the  
18 individuals who are aware of instances of  
19 confusion relating to any of the Rosetta Stone  
20 marks in Google's advertising programs?

21 A. Yeah. I think you'd have to ask all  
22 of those individual folks yourself what specific  
23 instances they're aware of. I hear about it  
24 anecdotally, but I can't provide specific  
25 instances. I mean, of course, regional managers



1 of the kiosk, my kiosk director.

2 Q. And the anecdotal stories that --  
3 that you're aware of, those all relate to someone  
4 in a kiosk being approached and being --

5 A. No. They also relate to returns.  
6 Calls to our call centers. Customer support.  
7 And there are others as well.

8 Q. Does Rosetta Stone do anything at  
9 all to track what it contends are instances of  
10 confusion related to Rosetta Stone marks and  
11 Google's advertising program?

12 MS. SPAZIANO: Objection. Vague as  
13 to time. Lacks foundation.

14 A. Now?

15 Q. For the period of time that you've  
16 been at Rosetta Stone.

17 A. I don't know.

18 Q. Okay. I'll just flip through this  
19 really quick.

20 MS. BROWN: Okay. Thank you very  
21 much for your time. I don't have any more  
22 questions for you today.

23 MS. SPAZIANO: I don't have any  
24 questions.

25 THE VIDEOGRAPHER: We're going off